

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**SHERRI A. THOMAS,
Grievant,**

v.

Docket No. 2014-0439-LogED

**LOGAN COUNTY BOARD OF EDUCATION,
Respondent.**

DECISION

Grievant, Sherri A. Thomas, is employed by Respondent, Logan County Board of Education ("Board") as a custodian. Ms. Thomas filed a level one grievance form dated October 4, 2013, alleging the following:

Grievant contends that (a) her current work shift is inappropriate, arbitrary and capricious and that it interferes with her ability to perform her work assignment; (b) that the work assignments for custodians at Mann Elementary are unequal to her detriment. Grievant alleges discrimination & favoritism. [W. VA. CODE § 6C-2-2(d) & (h)].¹

As relief, Grievant seeks:

[To] . . . (a) change of her daily work hours to 11 a.m. – 7 p.m.; (b) redistribution of custodial assignments at Mann Elementary School by removal of four classrooms from Grievant's schedule and the addition of the office, work room and lounge to Grievant's schedule. (This would restore her schedule to its original form.)

After a continuance, a level one conference was held on November 4, 2013. A level one decision denying the grievance was issued on December 12, 2013. Grievant

¹ This is the statement of grievance on the appeal form to level two. This statement was prepared by the Grievant's representative and is a more complete statement of Grievant's claim. The request for relief set out above is also from the appeal form to level two.

appealed to level two by form dated December 23, 2013, and a mediation was held on March 10, 2014. Grievant appealed to level three by form dated March 17, 2014.

A level three hearing was held at the Charleston office of the West Virginia Public Employees Grievance Board on June 18, 2014. Grievant personally appeared, and was represented by John E. Roush, Esquire, West Virginia School Service Personnel Association. Respondent, Logan County Board of Education, was represented by Shana L. O'Briant Thompson, Esquire, General Counsel for the Board. This matter became mature for decision upon receipt of the parties' Proposed Findings of Fact and Conclusions of Law on July 22, 2014.

Synopsis

Grievant returned from maternity leave to find that adjustments had been made to the evening custodial positions at her school which reduce the duties for her coworker and added some responsibilities to Grievant. Grievant argues that the duty adjustments were arbitrary and capricious, and based upon favoritism and discrimination. Respondent demonstrated that the adjustments were made as a result of an additional custodian position being added to the school which made it possible to adjust the assignments so that the duties were more evenly distributed and fair. The reasons for the assignment adjustments were reasonable, not arbitrary or capricious, and not the result of favoritism or discrimination. Accordingly, the grievance is DENIED.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Grievant, Sherri A. Thomas, is employed as a regular full-time custodian at Man Elementary School.
2. Grievant has been a full-time custodian at Man Elementary school for approximately seven years. While she has held a different assignment at the school, she has always worked the evening shift which runs from 3:00 p.m. to 10:30 p.m.
3. Man Elementary is constructed so that it shares some spaces with Man Middle School. Those spaces include an entrance, a commons area, a gymnasium, and various other rooms.
4. During the 2012 - 2013 school year, Grievant's evening shift assignment included cleaning the following:
 - the gymnasium;
 - classrooms 154, 156, 158, and 160 (adjacent to the gym);
 - the commons area;²
 - two restrooms adjacent to the common area;
 - the lounge;
 - the workroom; the office; and,³
 - a small portion of the grounds in front of the office area.
5. During the 2012 - 2013 school year, the second evening shift custodian, Susan Davis, was assigned to clean fourteen classrooms (numbered 100 - 113 consecutively), the nurse station and two Title I rooms.⁴ This assignment is generally referred to as the "main hallway" assignment.

² This area is shared by both schools. It has tables and chairs on a tile floor and is smaller than the gymnasium but larger than a classroom.

³ The lounge, workroom, and office are each smaller than any classroom and they are only used by adults.

⁴ The nurse station in Title I rooms are similar in size to the lounge and workroom.

6. Grievant has previously held the main hallway assignment which was performed by Ms. Davis during the 2012 - 2013 school year. Grievant bid out of that assignment because it was too difficult to get done due to the number of classrooms as well as the number of restrooms connected to the classrooms. Grievant bid into her 2012 - 2013 school year assignment because it was much easier than the main hallway assignment. A number of other custodians had performed the main hallway assignment prior to Grievant filling that position.

7. The principal at Man Elementary School is Linda Burgess. Ms. Burgess had difficulty keeping custodians in the main hallway assignment because it was so challenging. Custodians with that assignment routinely bid to easier assignments when they had an opportunity.

8. Grievant was absent for a few days at the end of the 2012 - 2013 school year and gave birth during the summer of 2013. Grievant returned to work when her pregnancy leave ended, around August 28, 2013, a few weeks into the 2013 - 2014 school year.

9. Principal Burgess and the principal for Man Middle School have been asking for an extra day-shift custodian for the two schools because the workload for the custodian who was splitting time between the two schools was more than one person could handle.

10. Just prior to the beginning of the 2013 - 2014 school year, Principal Burgess received notice from the Board's central office that a new day-shift custodian position was going to be added pursuant to the request of the two principals.

11. Principal Burgess used this opportunity to redistribute the custodial duties among her custodial staff in order to even up the duties in the assignments and make the distribution of duties fair. The changed assignments took effect at the beginning of the 2013 – 2014 school year, and were in place when Grievant returned from maternity leave on or about August 28, 2013.

12. The changes in Grievant's work schedule consisted of the following:

- Four classrooms numbered 100 - 103 were removed from the main hallway assignment and added to Grievant's duties.
- The lounge, office, and work room were removed from Grievant's duties and assigned to the new daytime custodian.⁵

13. The four classrooms added to Grievant's assignment were larger, and required more time to clean than the three rooms that were removed from her duties. Additionally, there are bathrooms connected to the classrooms that need to be cleaned. However, Grievant is able to complete her new assignments within each workday.

14. The new work assignments accomplished one of Principal Burgess's goals; to reduce the duties in the main hallway assignment by more fairly distributing those duties among the other two custodians. The main hallway assignment is now less difficult than it was. Yet, that assignment remains more difficult than the new assignment given to Grievant.⁶

⁵ Grievant's Exhibit 1 consists of a diagram of Man Elementary School and is marked to demonstrate Grievant's schedule for the 2012 - 2013 school year and her schedule for the 2013 - 2014 school year.

⁶ Grievant testified that the main hallway assignment continued to be strenuous and she would not apply for the position if it became vacant. Grievant believes that her new assignment, while more difficult, remains less strenuous than the main hallway assignment performed by Ms. Davis.

Discussion

As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving the grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not. *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

As Respondent correctly points out, school principals are charged by statute with the responsibility of making assignments necessary “for the planning, management, operation and evaluation of the total educational program of the school to which they are assigned.” W. VA. CODE § 18A-2-9. However, these actions must be “in accordance with the rules and regulations of the county board of education,”⁷ and may not be arbitrary or capricious. *See also Dillon v. Board of Educ.*, 351S.E.2d 58 (W.Va. 1986).

Grievant asserts that the “affected motivation for the change of custodian assignments was to make things easier for Ms. Davis and harder for Grievant.”⁸ Grievant points to the fact that she held the main hallway position for two years prior to Ms. Davis and no efforts were made to lighten the schedule during that time. The schedule was only altered when Ms. Davis took the position. Consequently, she alleges the changes to the duty assignments were the result of favoritism shown to Ms. Davis and discrimination against Grievant.

⁷ *Id.*

⁸ Grievant’s Proposed Findings of Facts and Conclusions of Law.

For purposes of the grievance procedure, "discrimination" is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). "Favoritism" is defined as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee" unless agreed to in writing or related to actual job responsibilities. W. VA. CODE § 6C-2-2(h). In order to establish either a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

- (a) That he or she has been treated differently from one or more similarly-situated employee(s);
- (b) That the different treatment is not related to the actual job responsibilities of the employees; and,
- (c) That the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008). See also *Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Morgan v. Dep't of Transp./Div. of Highways*, Docket No. 2008-1714-DOT (May 13, 2009); *Westfall v. Dep't of Transp./Div. of Highways*, Docket No. 2009-0339-DOT (Oct. 30, 2009).

W. VA. CODE § 18A-2-9

Grievant and Ms. Davis are similarly situated to the extent that they are both custodians on the evening shift at Man Elementary School. It does appear that Grievant is being treated differently than Ms. Davis inasmuch as the duties from Ms. Davis's assignment were reduced and Grievant's responsibilities were increased. However, it is

clear from the testimony that the difference in treatment of the two employees was specifically related to the actual job responsibilities that they are performing.

Grievant agreed that the main hallway assignment performed by Ms. Davis was extremely difficult. She bid on her present assignment because it was not as rigorous. Principal Burgess and the principal of Man Middle School had been trying to get another custodial position to share between the two schools for some time. One of the reasons given by Ms. Burgess for their efforts was that it would allow her to reduce some of the duties from the main hallway assignment since the assignment was so difficult that Principal Burgess had trouble maintaining employees in that position. While the principals were unable to get an additional custodial position while Grievant held the hallway assignment, there is every indication that they were attempting to do so even at that time.

It is clear from the evidence that the motivation for changing the custodial assignments at Man Elementary School was to fairly distribute the duties. The reason for implementing the changes was reasonable and not arbitrary and capricious.⁹ Principal Burgess had been trying to do this for some time and was only able to accomplish that goal when the Board assigned an additional custodian to the two schools during the summer of 2013. There is no indication that the change was made

⁹ Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of opinion. See *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996).

specifically to favor Ms. Davis, but rather the change would have been made regardless of who held the main hallway assignment. Grievant failed to prove that the change of assignments was a result of favoritism.

Likewise, Grievant failed to prove the adjustment of the assignments resulted from discrimination against her. The changes were made based upon the actual job responsibilities of each employee. Ultimately, while Grievant ended up with marginally more duties, her position remained more favorable and less difficult than the main hallway assignment, even after the adjustments were made. Accordingly, the grievance is DENIED.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving the grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990).

2. School principals are charged by statute with the responsibility of making assignments necessary “for the planning, management, operation and evaluation of the total educational program of the school to which they are assigned.” W. VA. CODE § 18A-2-9. However, these actions must be “in accordance with the rules and regulations of the county board of education,” and may not be arbitrary or capricious. *Id.* See also *Dillon v. Board of Educ.*, 351 S.E.2d 58 (W.Va. 1986).

3. Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that is so implausible

that it cannot be ascribed to a difference of opinion. See *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996).

4. The reasons for adjusting the duties of the evening custodians at Man Elementary School were fair and reasonable and the assignments were made in a way that accomplished those purposes. The reassignment of duties was not arbitrary or capricious.

5. For purposes of the grievance procedure, “discrimination” is defined as “any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees.” W. VA. CODE § 6C-2-2(d).

6. “Favoritism” is defined as “unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee” unless agreed to in writing or related to actual job responsibilities. W. VA. CODE § 6C-2-2(h).

7. In order to establish either a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

- (a) That he or she has been treated differently from one or more similarly-situated employee(s);
- (b) That the different treatment is not related to the actual job responsibilities of the employees; and,
- (c) That the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm’n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep’t of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008). See also *Bd. of*

Educ. v. White, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Morgan v. Dep't of Transp./Div. of Highways*, Docket No. 2008-1714-DOT (May 13, 2009); *Westfall v. Dep't of Transp./Div. of Highways*, Docket No. 2009-0339-DOT (Oct. 30, 2009).

W. VA. CODE § 18A-2-9.

8. Grievant did not prove by a preponderance of the evidence that the adjustment of the assignments of the evening shift custodial positions at Man Elementary School constituted favoritism or discrimination.

Accordingly, the grievance is denied.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. See W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. See *also* 156 C.S.R. 1 § 6.20 (2008).

DATE: OCTOBER 23, 2014.

WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE